NO. 80-581

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

COMMONWEALTH EDISON COMPANY, et al.,
Appellants,

vs.

STATE OF MONTANA, et al.,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF MONTANA

BRIEF AMICUS CURIAE OF THE STATE OF TEXAS IN SUPPORT OF JURISDICTIONAL STATEMENT

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BRIEF AMICUS CURIAE OF THE STATE OF TEXAS IN SUPPORT OF JURISDICTIONAL STATEMENT

The Jurisdictional Statement filed in this cause discusses substantial federal questions presented in the construction of the Montana coal severance tax. Those questions include restrictions of the Commerce Clause upon the states, supremacy of federal law, and the role of competing state interests within our federal system. Those questions are substantial in regard to constitutional jurisprudence. Resolution of those questions is of equal substance and importance to states who consume, produce, and tax energy resources.

INTEREST OF THE STATE OF TEXAS IN THE RESOLUTION OF THE SUBSTANTIAL FEDERAL QUESTIONS PRESENTED

Energy Production and Consumption Are Subject to Federal Control

Texas has led the nation in the production of energy for the past fifty years. One-fourth of all energy ever produced in this country has come from the state, mostly in the form of oil and natural gas, with cumulative production of 42 billion barrels of oil and 212 trillion cubic feet of gas.[1] The availability of this once cheap and abundant energy supply has made the Texas economy dependent upon energy. Among the fifty states, Texas is the leader in energy consumption.[2]

The wellhead price of natural gas sold in the interstate market has been subject to federal controls since 1954.[3] Federal involvement in energy production and consumption became preeminent in the past decade. The OPEC oil embargo of 1973, and the continuing energy crisis that followed it, prompted Congress to enact a series of laws confirming and promoting a policy of obtaining the maximum possible use of this nation's relatively plentiful domestic fuels, such as coal, in preference to scarce and costly fuels such as imported petroleum and natural gas.[4]

[1] Report of the House Joint Interim Committee on a State Energy Plan, Texas House of Representatives, 66th Legislature at 1.

[2] *Id.*

[3] In *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), this Court determined that the regulatory jurisdiction of the Federal Power Commission (now Federal Energy Regulatory Commission) extended over rates of all wholesales of natural gas in interstate commerce.

[4] *See*, e.g., the Emergency Petroleum Allocation Act of 1973 (Pub.L. 93–511, 88 Stat. 1608); the Federal Nonnuclear Energy Research and Development Act of 1974 (Pub.L. 93–577, 88 Stat. 1878); the Energy Reorganization Act of 1974 (Pub.L. 94–438, 88 Stat. 1233); the Energy Supply and Environmental Coordination Act of 1974 (Pub.L. 93–319,

The United States could no longer depend upon imported petroleum. Natural gas must be conserved for its highest and best uses. Rather than trust market forces to shift consumption patterns, Congress attempted to determine legislatively the types of fuel Texas and the nation would consume. At the same time Congress was controlling demand, it wished to protect consumers from the effects of increasing prices of energy. Wellhead controls of natural gas prices were extended to gas produced and consumed wholly within a state.[5] The price of domestic crude oil was held substantially below levels on the world market.[6]

The Powerplant and Industrial Fuel Use Act of 1978,[7] which attempts to conserve petroleum and natural gas for uses other than as boiler fuel, is a key element in the federal conservation program. The Act prohibits new electric power plants from using oil or natural gas as a primary fuel source and prohibits the use of natural gas in existing facilities after 1989. Further, unless natural gas was used as a primary source during 1977, its use is banned before the January 1, 1990, deadline; plants meeting the 1977 usage exception are limited to their historical consumption. Exemptions from the regulations will be granted only in certain limited circumstances, and the Act "is expected to force utilities to increase their demand for coal."[8]

The consequences of the federal energy policy are significant. Environmental and safety considerations prevent significant nuclear power contributions. Reliable power in commercial quantities from the sun, wind, or waves may be decades away.[9] Texas and other states will be forced to

88 Stat. 246); the Energy Policy and Conservation Act of 1976 (Pub.L. 94–163, 89 Stat. 871); the Energy Conservation and Production Act (Pub.L. 94–385, 90 Stat. 1125); and the Powerplant and Industrial Fuel Use Act (Pub.L. 95–620, 92 Stat. 3289).

[5]Natural Gas Policy Act of 1978, Pub. L. 95–621, 92 Stat. 3350.

[6]Emergency Petroleum Allocation Act of 1973 and Energy Policy and Conservation Act of 1976, *supra*, n. 4.

[7]*Supra*, n. 4.

[8]1 EN. MNGM'T (CCH) ¶3745.

[9]*See* R. STOBAUGH & D. YERGIN, ENERGY FUTURE (1979).

substitute large amounts of coal for the natural gas and oil presently used to fuel utility and other industrial boilers. Geography and environmental considerations militate Texas and other states to use low sulphur western coal. Since twenty-five percent of the nation's coal reserves are located in Montana, consuming states will have to use Montana coal.

The Impact of the Tax Upon The States and Upon the Federal Energy Program Is Substantial

Texas' concern with the Montana tax arises in several interrelated contexts.[10] First, utilities serving Texas consumers are committed to purchase Montana coal. The City of Austin, for example, will be burning large amounts of the coal in its electric generating facilities. The Fayette I facility, to be operated by Austin and the Lower Colorado River Authority, will purchase fifty million tons of Montana coal during the twenty-five year term of its contract with Decker Coal Company. Houston Lighting & Power will purchase 176 million tons of Montana coal for use in its own facilities. The interests of the state and its citizens, as consumers and ratepayers of electricity produced from the combustion of that coal, are greatly affected by the tax and consequent cost of that coal. Texas' concern in this regard is not limited to disfavoring a net transfer of wealth from its citizens to the Montana treasury. We are concerned that the artificial added cost of energy imposed by the tax will either prevent new industries from developing in Texas or

[10]Because of Texas' long reliance on its own natural gas and petroleum, and because it lacks substantial deposits of high-quality coal, the shift to increased coal use will be far more difficult and costly for Texas than for other areas of the country. Based upon a United States Department of Energy Study, "Analysis of Proposed U.S. Department of Energy Regulations Implementing the Powerplant and Industrial Fuel Use Act" (November 1978), approximately one-half of national conversion costs associated with the Powerplant and Industrial Fuel Use Act will be borne in Texas. Texas concerns involve, in part, exacerbation of those conversion costs by the additional tax burden exacted.

encourage existing industry to leave the state in order to find cheaper energy elsewhere.

Second, Texas fears that if the Montana tax is allowed to stand, other coal producing states will raise their tax structures to the Montana level. Such a result would subject most of the coal consumed in Texas to the tax. Consumers would have few alternatives. They could look abroad for competing sources of coal,[11] or they could suffer the consequences of decreased energy production. In any case, the federal program seeking to replace coal for the use of oil and gas would be hampered significantly by the high costs imposed.[12]

Third, the high level of the Montana tax could spur other states to tax their own resources accordingly. Some states would be encouraged to discover new sources of tax revenues from goods sold upon the national economy. Other states may simply tax old sources at new rates. In Texas, for example, there presently is no severance tax upon coal. Oil is taxed at 4.6% of value and natural gas at 7.5% of value. Although much of the energy produced in Texas is consumed within the state, and there would be political constraints imposed by those consumers, it is possible that the Texas Legislature will at least consider escalating Texas' own severance taxes. A resolution of the issues presented by the instant appeal would provide a useful measure for legislative action, if not a constraint upon the prospect of such tax initiatives.

Finally, Texas' concern might be expressed best as a concern regarding federalism. If Texas were autonomous, it would use its own energy resources for domestic pur-

[11]This result, of course, is directly contrary to the purposes of the entire panoply of statutes constituting the national energy policy. The tax which is the subject of this litigation thus serves to frustrate the national energy policy of energy independence by substituting a dependence on foreign coal for a dependence on foreign oil.

[12]As *amicus curiae* in the proceedings below, Texas argued that the Montana tax substantially impaired and frustrated the federal program. That argument will be presented, as *amicus curiae*, to this Court, upon consideration of the Montana court's decision.

poses and export the remainder at the price level of the world market. Texas would not need Montana coal. Texas is not autonomous and neither is Montana. Texas and Montana must exist and do exist as sister states within a union of states. That union has determined that Texas cannot use its own resources for certain purposes; Texas oil and natural gas must be saved for use elsewhere and then must be sold at federally mandated prices. The federal energy program, and the Constitution under which all federal laws and state actions must proceed, prevent Texas from acting in a parochial manner to the detriment of the nation as a whole. In that way it should prevent any state from inordinately benefiting from any federal response to a national problem.

ARGUMENT: THE TAX SHOULD BE EXAMINED

Texas believes that the Montana coal severance tax presents substantial constitutional questions appropriate for this Court's review.[13] Although each of those questions merit such attention, Texas has focused upon one question which it feels is of particular substance. That question is whether, absent specific limitation, the Montana coal severance tax is preempted or invalidated as frustrating or impairing the full objectives and purposes of Congress in enacting its federal energy program.

Texas believes that when the tax, the congressional program and the Supremacy Clause, as interpreted in *Hines v. Davidowitz*, 312 U.S. 52 (1941) and *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), are considered, the tax cannot stand. Accordingly, the decision of the Montana Supreme Court should be reviewed.[14]

[13] In consideration of this Court's many responsibilities and finite resources, Texas will not repeat the arguments aptly presented in appellants' Jurisdictional Statement.

[14] As noted, Texas as *amicus curiae* below has limited its argument to the preemption doctrine and the pervasive federal energy policy. Although we have concentrated our efforts in that regard, we do not wish to minimize the importance of the other substantial federal questions presented.

CONCLUSION

Texas supports the Jurisdictional Statement of appellants in this cause and for the reasons expressed above, Texas urges the Court to note probable jurisdiction to review the opinion and judgment of the court below.

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